No. 89-1019

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In The Supreme Court Of The United States

OCTOBER TERM, 1989

SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM AND MICHAEL T. HOLLIFIELD,

Petitioners,

v.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as Governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Charles P. Roberts, III *
HAYNSWORTH, BALDWIN, JOHNSON AND GREAVES, P.A.
230 North Elm Street
Suite 1650
Greensboro, NC 27401
(919) 373-0325

Richard B. Kale, Jr.
HAYNSWORTH, BALDWIN, JOHNSON AND GREAVES, P.A.
Post Office Box 10888
Greenville, SC 29603
(803) 271-7410

* Counsel of Record

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

As is discussed herein, Respondents contend that the Petition should be denied. Because the "Questions Presented" by Petitioners include unfair characterizations of the record below, Respondents suggest that the questions be reformulated as follows:

1. Do this Court's decisions in United States v. O'Brien, 391 U.S. 367 (1968); McCray v. United States, 195 U.S. 27 (1904); and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) preclude a federal court from invalidating facially neutral legislation, which merely defines the types of payroll deductions authorized for state

employees, on the basis of the anti-SCEA comments of a handful of legislators?

2. Does the First Amendment prohibit a state legislature from refusing to authorize payroll deductions to professional associations generally, including an organization whose outspoken political views had antagonized a handful of legislators?

3. Is a state legislature constitutionally required to assist a professional association in collecting dues simply because that association has taken positions on controversial public issues?

4. Is it rational for a state legislature to authorize payroll deductions for a single general interest association

which is open to all state employees without regard to their profession or occupation yet decline to authorize payroll deductions for all other special interest professional associations?

PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.

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SOUTH CAROLINA EDUCATION ASSOCIATION, NELLE H. TAYLOR, BETTY JEAN CUNNINGHAM and MICHAEL T. HOLLIFIELD,

Petitioners,

v.

JOHN T. CAMPBELL, as Secretary of State of South Carolina, CARROLL CAMPBELL, as Governor of the State of South Carolina, and EARLE MORRIS, as Comptroller General of the State of South Carolina,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

John T. Campbell, Carroll Campbell, and Earle Morris ("Respondents" or "State") respectfully request that the

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

OPINIONS BELOW

The relevant opinions below are fully set out in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are adequately set out in the Petition.

STATEMENT OF THE CASE

Respondents do not adopt the Petitioners' Statement of the Case. A full and fair statement of the case is set out in the opinion of the United States Court of Appeals for the Fourth Circuit, which can be found at pages

A-2 through A-20 of the Appendix to the Petition. Respondents hereby adopt and incorporate the Fourth Circuit's statement by reference.

Several specific assertions made by Petitioners, however, warrant special mention. First, Petitioners assert that the members of the legislature made no attempt to mask their purpose -- "namely to injure the SCEA because of its advocacy of controversial legislative proposals, endorsements of candidates (including the endorsements of opponents of sitting members of the General Assembly) and affiliation with the National Education Association." The record does not bear this assertion out. The stated purpose of the legislation was to authorize payroll deductions for bona fide charities. Although the SCEA, as

well as other professional associations, were excluded, and although a small handful of legislators spoke out against the SCEA, this does not create an intent on the part of the legislature to injure the SCEA.

Second, Petitioners repeatedly attempt to suggest that the SCEA is the only organization that is adversely affected by the legislation. This is absolutely untrue. The record below indicates that there are numerous professional associations that represent various groups of state employees. The State of South Carolina employs more than 62,000 employees in some 2,000 job classifications. With

the exception of the State Employees Association, every single professional association representing state employees is excluded from payroll deductions.

Third, Petitioners state that the Fourth Circuit did not overturn or question the district court's finding that the purpose of the legislation was to deprive the SCEA of a valuable benefit. This is a misstatement. The Fourth Circuit reversed the district court's decision in its entirety. Moreover, the Fourth Circuit specifically held that the record was "manifestly sparse and contradictory" and that "the district court's imputation to the General Assembly of the apparent motivation of ten voluble legislators and general reliance on the testimony of select legislators was

inappropriate under both state and federal rules of statutory construction" (A. 51-52). Clearly, the Fourth Circuit concluded that the record did not establish the alleged purpose.

REASONS WHY THE PETITION SHOULD BE DENIED

The Fourth Circuit's opinion is a thoughtful, well-written analysis of the legal and factual issues presented in this case. The arguments raised in the Petition, with the exception of the Bill of Attainder argument, were presented to the Fourth Circuit. The Fourth Circuit rejected each of these arguments and fully explained why. The reasons given by the Fourth Circuit are the same reasons that this Petition should be denied and are adopted herein by Respondents.

Respondents will not attempt to repeat these arguments, but simply will try to expand on them where appropriate.

I.

The Fourth Circuit's Decision Properly Applied The Supreme Court's Precedents

The Fourth Circuit recognized that the "SCEA's First Amendment claim is not founded on any direct impact the legislation has on free speech or the free flow of information . . . [but] rests on the alleged anti-SCEA motivation of the General Assembly in not authorizing withholding for SCEA membership dues" (A-21). Petitioners do not dispute this characterization of their claim. Nor do they dispute the Fourth Circuit's statement that the legislation "is facially neutral and merely defines the type of de-

ductions the State will authorize from the paychecks of state employees" and "does not prohibit, regulate, or restrict the right of the SCEA or any other organization to associate, to solicit members, to express its views, to publish or disseminate material, to engage in political activities or to affiliate or cooperate with other groups." Instead, they argue that federal courts are free to invalidate legislation on the basis of the subjective motivation of the legislature.

A. The Decisions Of This Court Reject The Notion That Legislation May Be Declared Unconstitutional Solely Because Of The Subjective Motivation Of The The Legislature.

This Court has for some 180 years rejected the idea that a federal court may invalidate legislation solely on

the basis of a perceived subjective motivation of the legislature. The Fourth Circuit's opinion contains a careful and complete analysis of the Supreme Court's decisions in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) and United States v. O'Brien, 391 U.S. 367 (1968) (A. 29-31).

The Fourth Circuit correctly noted that judicial inquiries into legislative motivation endanger the separation of powers doctrine. In Kilbourn v. Thompson, 103 U.S. 168 (1881), the Court stated, "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to governments, whether state or national, are divided into the three grand departments, -- the executive, the legislative, and the

judicial" and that "the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others." 103 U.S. at 190.

In Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), the Court quoted James Wilson, one of the framers of the Constitution and a former Supreme Court Justice, as having said that the doctrine of separate and independent powers dictated that the proceedings of each branch "should be free from the remotest influence, direct or indirect, of either of the other two powers." 295 U.S. at 630 (quoting Andrews, The Works of James Wilson (1896), (Vol. 1, p. 367).

In McCray v. United States, 195 U.S. 27 (1904), the Supreme Court

faced a constitutional challenge to a tax on oleomargarine. The allegation was made that Congress had acted on the basis of an improper purpose or motive. The Court reviewed in great detail the cases relating to the permissibility of such inquiries and stated that "[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." 195 U.S. at 56.

The Court explained that judicial inquiries into legislative motive are not permitted because such inquiries are inconsistent with the constitutional concept of separation of powers:

It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and all the grave functions lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and

> respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions.

195 U.S. at 54-55.

Where a legislative body exercises a lawful power for an improper motive or purpose, the remedy "lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power." 195 U.S. at 55.

B. This Case Does Not Fall Within the "O'Brien" Exception.

In United States v. O'Brien, 391 U.S. 367 (1968) this Court noted that there are limited exceptions to the principle that judicial inquiry into legislative motivation is prohibited,

i.e., when "the very nature of the constitutional question requires an inquiry into legislative purpose." 391 U.S. at 383 n. 30. The Fourth Circuit recognized that this exception includes race/sex discrimination cases, establishment of religion cases and First Amendment challenges to statutes "which on their face directly inhibit or have the inevitable effect of inhibiting freedom of speech or related constitutional rights" (A. 35-37). The Fourth Circuit held, however, that this case did not fit within any of these exceptions (A. 38).

Petitioners dispute the Fourth Circuit's analysis by citing the same cases that the Fourth Circuit distinguished. Each of the cases cited falls within one of the categories

which the Fourth Circuit recognized as being within the O'Brien exception. The distinctions drawn by the Fourth Circuit are well founded and cannot be overcome by mere recitation of the same cases that have been distinguished.

Significantly, Petitioners do not cite a single case in which a federal court overturned a statute solely because of motive when the statute did not on its face directly inhibit speech activities. In Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. 788, 797 (1985), the Court made it clear that the seminal issue in a First Amendment case is whether "speech protected by the First Amendment" is regulated, "for, if it is not, we need go no further." Cornelius involved a challenge to an

Executive Order which defined what organizations could and could not solicit contributions in the annual Combined Federal Campaign (CFC), a charity drive conducted in the federal work place during working hours. Because solicitation of contributions was deemed protected speech activity, it was necessary to look at whether the purpose of the Order was to suppress a particular point of view. 473 U.S. at 806.

Here, the Petitioners do not assert that payroll deductions constitute speech protected by the First Amendment. Given this concession, the Court "need go no further."

If Petitioners' argument is accepted, every piece of legislation is subject to challenge on the ground

that a handful of legislators spoke unfavorably of a particular individual or group who was adversely affected by the legislation or who, as here, was not granted a particular benefit. The consequences are obvious and should be avoided.

C. Petitioner's Reliance on Perry v. Sindermann Is Misplaced.

Petitioners cite Perry v. Sindermann, 408 U.S. 593, 597 (1972) for the proposition that government cannot deny a person a valuable benefit because of that person's exercise of First Amendment rights. In Perry, the Court noted that this principle has "most often" been applied "to denials of public employment." 408 U.S. at 597. Thus, the courts have held that public employees cannot be penalized or denied benefits because of the

exercise of First Amendment rights. It is one thing for courts to inquire into the motives of public employers in making employment decisions; it is quite another for a court to inquire into the subjective motivation of the supreme sovereign body of a state in enacting particular legislation when the legislation is obviously within the power of the body and has no facial impact whatsoever on freedom of speech.

When a court is reviewing an administrative decision of a local body, as opposed to a legislative act of the supreme sovereign body of a state, the separation of powers concerns outlined in McCray, supra, are not implicated. The nature and degree of intrusion that is inherent in the latter situa-

tion is the very reason that this Court has made it clear that courts will not strike down otherwise constitutional legislation solely on the basis of some alleged illicit motivation.

Furthermore, in the typical public employment case, the employee is concededly the sole target of the challenged action. The adverse effect is obvious and intended. This is not the case, however, when legislation is involved. Legislation, by its very nature, is intended to regulate a broad area of concern or interest to the public. It affects many persons and groups in different ways. Whereas inquiring into the motivation of a public employment decision is not particularly difficult, inquiring into the motivation, as opposed to the

facial purpose, of legislation enacted by a multi-member legislature is an impossible task, one that the courts have consistently declined to undertake.

Clearly, public employment cases are distinguishable and do not undermine the Supreme Court's teachings in Fletcher v. Peck and United States v. O'Brien.

D. Differential Taxation Cases Are Not Applicable.

Petitioners rely on this Court's decisions in Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987) and Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1973) for the proposition that differential treatment of similarly situated First Amendment Actors "is considered content-based discrimina-

tion, flatly prohibited by the First Amendment, regardless of the motive behind the law." (Petition pp. 55-56). These cases, however, do not support the proposition for which they are cited and have no application to this case.

Initially, Petitioners' use of the term "First Amendment Actor" is misleading. Presumably, every person or group that is capable of engaging in speech activities is a First Amendment actor. Surely, a legislature may draw lines between First Amendment actors. Otherwise, every piece of legislation which differentiates between individuals or groups would be subject to strict scrutiny. Had the challenged legislation limited the SCEA's right to engage in speech activities while permitting other or-

ganizations to speak fully and freely, strict scrutiny would arguably apply. That, however, is not the case. Thus, the Fourth Circuit explained:

> The 1981 legislation only defines the types of deductions the state will authorize from the paychecks of state employees and does not restrict, on its face, the First Amendment rights of the SCEA to solicit members, to speak in open fora, to associate with any other organization, to engage in political activities, or to otherwise represent its members.

(A. 38).

The differential taxation cases cited by Petitioners turn on the fact that differential taxation is viewed as a direct burden on freedom of the press. Thus, in Minneapolis Star, the Court stated that "the framers perceived singling out the press for taxation as a means of abridging the

freedom of the press." 460 U.S. at 585 n. 7.

Clearly, the differential taxation cases are unique. As the legislation here does not impose a tax, and does not regulate or restrict speech, these cases provide no guidance.

E. The Fourth Circuit Properly Discounted Reliance On Testimony Of Legislators.

Petitioners assert that the testimony of legislators should have been considered since none of them raised the privilege of immunity. Although no legislator raised immunity, the State objected to such testimony on the ground that it was not competent, relevant or probative.

The Fourth Circuit properly held that the extensive questioning of legislators regarding their motives

and the motives of other legislators was "inimical to the independence of the legislative branch and inconsistent with the constitutional concept of separation of powers" and would have "a chilling effect on the legislative process." (A. 49).

Moreover, the Fourth Circuit correctly noted that under South Carolina law, legislative testimony is not competent (A. 39 to 40). This Court has recognized that state rules regarding competent evidence of legislative intent are entitled to deference. Minneapolis Star, supra, 460 U.S. 575, 580 n.3 (1983).

II.
The Fourth Circuit's Decision Does Not Conflict With The Eleventh Circuit's Decision In Georgia Association of Educators v. Gwinnett County School District

Petitioners assert that the Fourth Circuit's decision is in direct conflict with the Eleventh Circuit's decision in Georgia Association of Educators v. Gwinnett County School District, 856 F.2d 142 (11th Cir. 1988). It is clear, however, that neither the factual nor the legal issues in that case are the same as those involved in this case.

In Gwinnett County, plaintiffs offered evidence that they had been receiving dues deductions for more than twenty years. The superintendent, however allegedly had become hostile toward the plaintiffs because of their association with the NEA.

Upon the recommendation of the superintendent, the five member school board voted 4 to 1 to terminate dues deductions for plaintiffs. The district court granted summary judgment for the school district. On appeal, the Eleventh Circuit found that there were material issues of fact to be resolved and remanded for trial.

There are a number of notable differences between Gwinnett County and this case. First and foremost, Gwinnett County involved a challenge to an administrative decision of a five member local school board. This case involves a challenge to a legislative act of the 170 member South Carolina General Assembly acting in its sovereign capacity. Thus, Gwinnett County did not implicate sepa-

ration of powers concerns and is more akin to public employment cases. Second, the practicalities of addressing the motivation of a five-member administrative body are substantially different from those involved in assessing the motivation of a 170 member legislative body. Thus, the concerns outlined in McCray and O'Brien, which are clearly implicated in this case, were not present in Gwinnett County.

Third, in Gwinnett County, the school board specifically terminated the practice of granting deductions. Here, despite the SCEA's attempts to portray the legislation as terminating their deductions, it is clear that the SCEA's loss of payroll deductions flowed from the opinion of the South Carolina Attorney General that no de-

ductions could legally be permitted absent statutory authorization. This was a neutral decision which impacted charities such as the United Way the same that it impacted the SCEA. Indeed, the Comptroller General announced that he would cease deducting for the United Way unless legislation was enacted. The legislation that was passed in 1981 did not terminate deductions for the SCEA. It simply did not authorize such deductions.

Fourth, the challenged action in Gwinnett County was admittedly aimed solely at the Plaintiffs. Here, the challenged legislation was facially neutral and impacted numerous organizations other than the SCEA.

Clearly, Gwinnett County involved entirely different factual and legal

issues. It is not the type of direct conflict that requires Supreme Court intervention.

III

The Challenged Legislation Is Not A Bill Of Attainder. Moreover, Petitioners Never Raised This Argument In The Lower Courts.

Petitioners suggest that the challenged legislation is a Bill of Attainder since the SCEA is excluded from receiving payroll deductions and this constitutes a burden on the organization. This argument is without merit.

Petitioners never claimed in either the District Court or the Court of Appeals that this legislation was a Bill of Attainder. They may not at this stage raise a claim that was

never presented to the lower courts.

Moreover, this Court has rejected the proposition "that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." Nixon v. Administrator of General Services, 433 U.S. 425, 469-470 (1977). The Court explained:

> By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group

> made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment . . . . However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," . . . it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

433 U.S. at 470-471.

Clearly, this legislation is not a Bill of Attainder. It does not single out the SCEA. All professional associations, except for the State Employees Association, are excluded. Furthermore, the legislation inflicts no "punishment." Nor does it impose

any burden on the SCEA. The legislation simply does not grant payroll deductions to the SCEA. The purpose of the legislation was not to injure the SCEA, but was to authorize payroll deductions for bona fide charities. The SCEA simply did not fall within the group that the General Assembly sought to benefit.

CONCLUSION

The Fourth Circuit's opinion is thoughtful and comprehensive. Its analysis of the legal precedents and the factual issues is well founded and provides no basis for review by this Court. Nor are there any direct conflicts between the Fourth Circuit's decision and decisions in other circuits. Respondents respectfully request that the Petition be denied.

Dated this the 25th day of January, 1990.

Respectfully submitted,

Charles P. Roberts, III
COUNSEL OF RECORD
HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.
Renaissance Plaza
230 North Elm Street, Suite 1650
Greensboro, North Carolina 27401
(919) 373-0325

Richard B. Kale, Jr.
HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.
Post Office Box 10888
Greenville, South Carolina 29603
(803) 271-7410

FILING AND MAILING CERTIFICATE

I , Barbara E. Grove, hereby certify that on this 25th day of January, 1990, I filed with the Clerk's Office of the United States the foregoing Respondent's Brief in Opposition and further certify that I mailed this same date the required copies to the opposing counsel listed below:

Richard M. Gergel, Esquire
GERGEL, BURNETTE, NICKLES
GRANT & OUZTS
Post Office Box 1866
Columbia, South Carolina 29202
(803) 779-8080

Leon Friedman
Hofstra Law School
Hempstad, New York 11550
(212) 737-0400

Barbara Grove

Barbara E. Grove
Lawyers Printing Co., Inc.
701 East Franklin Street
Richmond, Virginia 23219
(804) 648-3664

STATE OF VIRGINIA/CITY OF RICHMOND:

The foregoing Respondents' Brief in Opposition was acknowledged before me this 25th day of January, 1990 by Barbara E. Grove.

My commission expires: 12/23/90

Donna M. Metzger
Notary Public